

A United Asian Bank Bhd v Ceras Credit Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-445-90
KAMALANATHAN RATNAM JC
30 JANUARY 1996

B

Banking — *Securities for advances* — *Guarantee* — *Demand for payment* — *Proof of service of notice of demand* — *Whether AR card necessary*

C

The plaintiff sued the first defendant as a borrower and the second to the fifth defendants as guarantors for a sum of RM 338,680.99 as at 31 October 1989 together with interest at the rate of 11.75% pa from 1 November 1989 to the date of realization. It was pleaded in the plaintiff's statement of claim that the said sum was due from the defendants as at the date that the demand for the same was made by the plaintiff. On 30 March 1994 the senior assistant registrar allowed the plaintiff's application for summary judgment against the second to the fifth defendants. This was the fourth and fifth defendants' appeal against the registrar's decision. A preliminary issue was raised as to whether there was a proper demand made on the fourth and fifth defendants in accordance with the demand clause in the guarantee when there was no evidence tendered to show that the letter of demand was conveyed to them.

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Held, allowing the appeal:

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(1) The plaintiff had already dictated in the guarantee the manner in which the demand was to be executed, that is the manner in which the notice of demand was to be proven as having been served. It was therefore incumbent upon the plaintiff to have exhibited some form of proof of service (see p 644E-F; *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610, *United Prime Corp Bhd v Q-Built Construction (M) Sdn Bhd & Ors* [1987] 1 CLJ 501 and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155 followed).

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(2) Where the demand clause in a guarantee does not specify that a demand notice is to be sent by registered post or by AR registered post, there is no need to show proof of actual receipt by way of an AR card duly acknowledged so long as the plaintiff can show that the notice of demand was properly addressed to the guarantors and handed to the post office (see p 644G-H; *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 AMR 1 followed).

I

[Bahasa Malaysia summary]

Plaintif telah mendakwa defendan pertama sebagai peminjam dan defendan kedua sehingga defendan kelima sebagai penggerenti untuk jumlah sebanyak RM338,680.99 setakat 31 Oktober 1989 bersama-sama dengan faedah pada kadar 11.75% setahun dari 1 November

1989 sehingga ke tarikh penghasilan. Plaintiff telah memplid di dalam pernyataan tuntutan beliau bahawa jumlah tersebut kena dibayar oleh defendan-defendan pada tarikh tuntutan untuk jumlah itu dibuat oleh plaintiff. Pada 30 Mac 1994 penolong kanan pendaftar telah membenarkan permohonan plaintiff untuk penghakiman terus terhadap defendan-defendan kedua hingga kelima. Ini adalah rayuan defendan-defendan keempat dan kelima terhadap keputusan pendaftar. Isu permulaan yang dibangkitkan adalah sama ada tuntutan yang sempurna telah dibuat ke atas defendan-defendan keempat dan kelima menurut klausa tuntutan di dalam gerenti apabila tiada bukti yang dikemukakan untuk menunjukkan bahawa surat tuntutan telah dihantar kepada mereka.

Diputuskan, membenarkan rayuan:

- (1) Plaintiff telah menetapkan di dalam gerenti cara bagaimana tuntutan perlu dilaksanakan, iaitu cara bagaimana notis tuntutan akan dibukti penyerahannya. Maka adalah menjadi kewajipan plaintiff untuk mengemukakan bukti penyampaian dalam sesuatu bentuk (lihat ms 644E-F; *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610, *United Prime Corp Bhd v Q-Built Construction (M) Sdn Bhd & Ors* [1987] 1 CLJ 501 dan *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155 diikuti).
- (2) Apabila klausa tuntutan di dalam satu gerenti tidak menetapkan bahawa notis tuntutan perlu dihantar melalui pos berdaftar atau pos berdaftar AR, adalah tidak perlu untuk menunjukkan bukti penerimaan sebenarnya melalui kad AR yang diakui sewajarnya asalkan plaintiff dapat menunjukkan bahawa notis tuntutan telah dialamatkan dengan betul kepada pengerenti dan diserahkan kepada pejabat pos (lihat ms 644G-H; *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 diikuti.)

Notes

For cases on guarantees, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1175-1193.

Cases referred to

- Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413
MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors [1990] 1 MLJ 180
Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd [1989] 3 MLJ 155
United Prime Corp Bhd v Q-Built Construction (M) Sdn Bhd & Ors [1987] 1 CLJ 501

- A *Venu Nair* (*Wong Som Nuck* with him) (*Wong Som Nuck & Co*) for the fourth and fifth defendants/appellant.
Yokinee Selvam (*Manjit Singh Sachdev*) for the plaintiff/respondent.

Cur Adv Vult

- B **Kamalanathan Ratnam JC:** This was an appeal by the fourth and fifth defendants against the decision of the learned senior assistant registrar ('the registrar') given on 30 March 1994 wherein he ordered that final judgment under O 14 of the Rules of the High Court 1980 be entered against them with interest and costs.

- C The plaintiff is a bank and the first defendant is the borrower to whom credit facilities had been granted by the plaintiff. The second to the fifth defendants were guarantors. The plaintiff claimed as against the defendants a sum of RM338,680.99 as at 31 October 1989 together with interest at the rate of 11.75% pa on monthly rests from 1 November 1989 to the date of realization. The guarantee executed by each of the defendants to the plaintiff dated 10 September 1985 was to a limit of RM526,000 together with all interest accrued, in respect of all monies due and owing by the first defendant.

- E It was pleaded in para 7 of the statement of claim that the said sum was due from the defendants as at the date that demand for the same was made by the plaintiff.

- F The first defendant having not entered an appearance within the specified period, the plaintiff obtained judgment in default against him on 10 April 1990 for the sum of RM338,683.99 together with interest at the rate of 11.75% pa on monthly rests from 1 November 1989 to the date of realization and costs of RM225.

The second and third defendants filed their defence on 11 June 1990 and the fourth and fifth defendants, represented by another firm of solicitors, filed their defence on 30 May 1990.

- G The plaintiff then filed an O 14 application for summary judgment against the second to the fifth defendants and in the affidavit in support of the said application (encl 16) the plaintiff annexed copies of various documents including the guarantees dated 10 September 1985 executed by each of the defendants separately.

- H Whilst numerous issues were raised by the defendants in their various affidavits for this appeal, both counsel for the plaintiff and for the fourth and fifth defendants had by consent agreed to raise a preliminary issue before me regarding the manner of the demand made by the plaintiff to the fourth and fifth defendants. Mr Nair, counsel for the fourth and fifth defendants, referred to encl 16 exh I-9 which was the demand letter dated 8 November 1989 from the plaintiff's solicitors addressed to the third, fourth and fifth defendants. The pith and substance of counsel's submission was that there was no evidence tendered in any of the affidavits that this letter was indeed conveyed to the fourth and fifth defendants. He pointed out that exh I-9 was not an AR registered letter nor was there evidence of

a certificate of posting. I was then referred to exh I-6 of encl 16 which was the guarantee and in particular to the clause in the guarantee relating to the manner in which the demand ought to have been made. The said clause is reproduced herewith:

A demand in writing shall be deemed to have been duly given to me/us or my/our legal personal representative by sending the same by post addressed to me/us at the address/respective addresses herein written or at my/our last known address and shall be effectual notwithstanding any change of residence or death and notwithstanding notice thereof to the bank, and such demand shall be deemed to be received by me/us or my/our legal personal representatives twenty-four hours after the posting thereof, and shall be sufficient if signed by any officer of the bank, and in proving such service it shall be sufficient to prove that the letter containing the demand was properly addressed and put into the post office.

Mr Nair, relying on the said clause, challenged the proof of service of the demand notice. He conceded that if the plaintiff was able to show that the notice of demand was correctly addressed, prepared and delivered to the post office and acknowledged by the postal authority, then he would not pursue with the preliminary issue. Miss Yokinee for the plaintiff conceded that based on the affidavits and exhibits that were before the court she was unable to show such compliance.

In *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 the plaintiff-respondent had brought a claim for money lent to the first defendant under overdraft facilities and interest thereon. The loans were guaranteed under continuing guarantees and indemnities by the other five defendants for the payment of all money owing by the first defendant still remaining unpaid on the general balance of the first defendant's account with the plaintiff. When the defendants failed to pay the stated sum the plaintiff filed a writ and statement of claim against them. Judgment was given for the plaintiff and the defendants-appellants appealed. The main issue in the appeal was whether the notice sent by the plaintiff was a proper demand under the guarantees. It was conceded that all the guarantors received carbon copies of the notice of demand meant for the first defendant. Salleh Abas LP in delivering the judgment of the Supreme Court, at pp 610-611 held as follows:

The notice of demand was therefore made only to the first defendant and not to any of the six guarantors including the four appellants. In our opinion, the law is very clear on this point. The respondent as creditor must prove a real demand by sending actual notice of demand to the respective guarantors. Sending a carbon copy of it as in this case is not enough ... The reason is that in the letters of guarantee the provisions about demand are a real stipulation and not mere words. ... Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor.

The Supreme Court in the above case also agreed with the decision of Zakaria Yatim J in the case of *United Prime Corp Bhd v Q-Built Construction (M) Sdn Bhd & Ors* [1987] 1 CLJ 501 that sending a carbon copy of the notice meant for the borrower with the words 'This is a demand upon you'

- A written against the names of the guarantors appearing at the bottom of the notice was insufficient to constitute a real demand and did not satisfy the requirements of cl 1 of the letters of guarantee.

- B In *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155 the Supreme Court had this to say with regard to a similar issue relating to demand for payment. Lee Hun Hoe CJ (Borneo) at p 157 held as follows:

- C ... Clause 10 provides that any demand for payment under the guarantee may be made by any officer of the bank or the bank's solicitors by letter sent by post addressed to the guarantor at his specified address or his last place of business or abode. It is true that cl 14 makes each guarantor a principal debtor. But this does not mean that the guarantor is not entitled to a proper demand. After all, the first defendant, the principal debtor, was served with a proper demand. Why should the guarantors to be treated as principal debtors, not be served with the proper demand?

- D We are unable to agree with the views of the learned judge in this case that no antecedent demand was required to create a cause of action and the mere filing of the writ and the service thereof was a sufficient demand obliging the third defendant to pay. Here the letter of guarantee is clear. A proper demand must be made. It is a condition precedent to establishing a claim against a guarantor.

- E In *MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180 Abdul Malek J (as his Lordship then was) held that whilst the letters of demand sent to the second, third and fourth defendants were valid as they had been sent to them individually by registered post in accordance with the terms of the guarantee, yet in the absence of the AR card in respect of the second defendant, he found that the second defendant was not served with the said notice of demand. It would however appear that this requirement has been overruled by the Supreme Court in the following case.

- G In *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 the Supreme Court had to consider an issue similar to that decided by Abdul Malek J (as his Lordship then was) in the *MBf Finance* case on the interpretation of cl 17 in the letter of guarantee which provided as follows:

- H 17 Any notice may be served on the undersigned or his/their executors, administrators or legal representatives either personally or by sending the same through the post in an envelope addressed to the last known place of address of the person to be served and a notice so sent shall be deemed to be served on the day following that on which it is posted.

Mohamed Dzaiddin SCJ said at p 418:

- I The central issue in the present appeal is whether on the proper construction of cl 17 of the said guarantee it could be held that it is sufficient to prove that the notice of demand was duly served on the respondent by sending the same through the post in an envelope addressed to the last known place of address of the respondent, and that it is irrelevant whether it was sent by registered post or by AR registered post or, as was held by the learned judge, that the deeming provision only applies to a notice sent by ordinary post and that since the appellant has taken on the added responsibility of sending the notice by AR registered post, it is only upon the return of the AR card

with an acknowledgment of receipt that the said notice has been effectively served on the respondent. With respect, we do not agree with the finding of the learned judge.

The Supreme Court held that cl 17 should be liberally and reasonably construed having regard to the surrounding circumstances. Guarantees should be interpreted in the same way as other commercial agreements, instead of strictly applying the contra proferentem rule. The Supreme Court further held that the word 'post' should be given its ordinary meaning and in the context of cl 17, a distinction should not be made between ordinary post and AR registered post. The word 'post' in its ordinary and natural meaning was wide enough to cover both registered and ordinary post. At p 419, the Supreme Court further held that:

In the context of cl 17 of the said guarantee, we are further of the view that it is not necessary that the appellant must show that the AR card has been returned duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed, pre-paid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established the deeming provisions will inevitably apply.

The words 'shall be deemed' in cl 17 meant 'shall be regarded as' and applied to a case where in fact the notice had not been received, as otherwise it had no meaning.

In the present case the plaintiff had dictated the manner in which the demand is to be executed, that is, the manner in which the said notice of demand is to be proven as having been served. In the circumstances, I hold that it is incumbent upon the plaintiff to have exhibited some form of proof of service. Every solicitor's firm ought to have a record book in which each letter that is posted to an addressee is recorded. Had the plaintiff's solicitors exhibited a copy of the page from the record book indicating that the notice of demand had indeed been put into the post, it would have been sufficient proof of service.

Alternatively if a copy of a certificate of posting had been exhibited, that too would have been sufficient. As was rightly conceded by counsel for the plaintiff there is no evidence to show that the said notice of demand was indeed handed to the post office. I am bound by the principle of stare decisis and I do so hold that there is no need to show proof of actual receipt by way of an AR card duly acknowledged by the fourth and fifth defendants so long as the plaintiff can show that the said notice of demand was properly addressed to the guarantors and handed to the post office.

In the circumstances I hold that there is no proof of the notice of demand being conveyed to the fourth and fifth defendants and therefore I allow the appeal with costs and set aside the order of the senior assistant registrar dated 30 March 1994.

Appeal allowed.